December 27, 2000

Mr. Richard L. Muller, Jr.
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OR2000-4845

Dear Mr. Muller:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 142609.

The Fort Bend Child Advocates, Inc. d/b/a Child Advocates of Fort Bend County ("Child Advocates"), which you represent, received four requests for information from three different requestors. Each of the three requestors seeks "all files" relating to the requestor and the requestor's family. The first requestor, in the fourth request, additionally seeks twenty-seven enumerated categories of information pertaining to Child Advocates. In regard to the first request, the first requestor has also submitted comments to this office. *See* Gov't Code § 552.304. You have submitted for our review, in three separate exhibits, the information responsive to the first three requests. You assert that this information, or portions thereof, is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, 552.111, and 552.131 of the Government Code. You have also submitted for our review a representative sample of the information responsive to the fourth request.[1] You assert that the responsive information, or portions thereof, is not "public information" subject to the

[1]We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

disclosure requirements of the Act. Alternatively, you assert that this information, or portions thereof, is excepted from public disclosure under sections 552.101, 552.102 and 552.103 of the Government Code. We have considered the exceptions you claim, your arguments, the submitted comments, and we have reviewed the submitted information.

We first address the information responsive to the first three requests. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. As to portions of the information responsive to the third request, you assert section 264.408 of the Family Code, which provides in relevant part:

> (a) The files, reports, records, communications, and working papers used or developed in providing services under this chapter are confidential and not subject to public release under Chapter 552, Government Code, and may only be disclosed consistent with this chapter.

You explain that the information at issue was compiled and produced by a multidiscliplinary team appointed pursuant to section 264.406 of the Family Code. We accordingly find this information is within the scope of section 264.408 of the Family Code. Because the release in this instance would not be in accordance with the provisions for disclosure contained in section 264.408, we conclude that the information is confidential pursuant to section 264.408 of the Family Code and therefore is excepted from disclosure by section 552.101 of the Government Code.

As to the remaining information responsive to the first three requests, you assert section 261.201(a) of the Family Code, which provides as follows:

> (a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:
>
> > (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
> >
> > (2) except as otherwise provided in this section, the files, reports, records, communications, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

We understand that the remaining information requested in the first three requests relates to allegations of child abuse and investigations by the Department of Protective and Regulatory

Services ("DPRS") prompted by those allegations. You explain in each case that Child Advocates was appointed by the court as guardian ad litem to the child or children who had allegedly been subjected to abuse, and that the information at issue was compiled and produced by the guardian ad litem in connection with the guardian ad litem's duties to provide services to the child. *See* Fam. Code § 107.002. We accordingly find that the remaining documents responsive to the first three requests are within the scope of section 261.201 of the Family Code. You have not indicated that Child Advocates has adopted a rule that governs the release of this type of information. Therefore, we assume that no such regulation exists. Given that assumption, the requested documents are confidential pursuant to section 261.201 of the Family Code. *See* Open Records Decision No. 440 at 2 (1986) (predecessor statute). With regard to the first request, the requestor has submitted documentation to this office demonstrating that the court has ruled, pursuant to section 261.201(c) of the Family Code, that the court file is open to the public. *See* Fam. Code § 261.201(c). The requestor therefore argues that the documents held by Child Advocates are subject to release to him. We disagree. The information provided by the requestor indicates that the court has ordered a public right of access to the documents filed with the court and held by the court, but this does not demonstrate that the court has ruled any of the information held by Child Advocates to be excepted from confidentiality. Accordingly, Child Advocates must withhold from disclosure the documents responsive to the first three requests under section 552.101 of the Government Code as information made confidential by law.[2] Because we are able to resolve the first three requests under section 552.101, we do not address the section 552.103, 552.107, 552.111, or 552.131 assertions.

We next address the information responsive to the fourth request. At the outset, we note that you represent to this office that there exists no information responsive to the categories numbered 3, 9, 12, 17, 18, 24, or 26 of the request. To the extent that responsive information created in response to these requests would constitute "public information" subject to the Act (discussed below), it is well established that the Act applies only to information already in existence and does not require a governmental body to obtain information not in its possession or to prepare new information in response to a requestor. *See, e.g.,* Open Records Decision No. 445 (1986). Because the information did not exist at the time the request was received, and to the extent responsive information, if it existed, would be subject to the Act, we find that Child Advocates is not required by the Act to provide information responsive to the categories numbered 3, 9, 12, 17, 18, 24, or 26 of the request.

As to the responsive information held by Child Advocates that existed at the time of the request, you argue that Child Advocates is not a "governmental body" as defined in section 552.003 of the Act. Alternatively, you assert that the records relating to particular divisions and activities of Child Advocates, or that do not directly pertain to the receipt or expenditure of public funds, do not constitute "public information" subject to the disclosure requirements

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[2]We note, however, that the child's parent(s) may have the statutory right to review the DPRS file on the alleged abuse. *See* Fam. Code § 261.201(g).

of the Act. *See* Gov't Code §§ 552.002 (defining public information); 552.003 (defining governmental body). In Open Records Letter No. 2000-3459 (2000) (copy enclosed), this office concluded that two of the programs of Child Advocates, Child Advocacy Center ("CAC") and Court Appointed Special Advocates ("CASA"), fall within the definition of a governmental body because these programs receive general support from public funds. Upon careful review of the additional information and arguments you have submitted in connection with the present request, we reaffirm Open Records Letter No. 2000-3459 (2000) in this regard. However, with respect to information relating only to Child Advocates' remaining programs and activities, specifically the Advisory Board, the CAC Advisory Council, the Development Committee, the Diligent Search Program, Friends of Fort Bend CASA, and the Family Assistance Program, we find, based on your representations and the other information you have provided, that there exists no nexus between these programs or activities and the receipt or expenditure of public funds. *See* Gov't Code § 552.003(5) (defining public funds). These programs and activities of Child Advocates therefore do not fall within the definition of a governmental body under the Act. *See* Gov't Code § 552.003(1)(A)(x) (defining governmental body as the *part, section, or portion* of an organization, corporation, commission, committee, institution, or agency that spends or that is supported in whole or in part by public funds). Thus, to the extent the responsive information pertains only to programs or activities other than the CAC and CASA programs, the information does not constitute "public information" subject to the Act.

With regard to the information that relates to the CAC and CASA programs, we understand your comments and arguments to seek clarification of the scope of this information that constitutes "public information" subject to the Act. We find that the situation here is closely analogous to the situation in Open Records Decision No. 602 (1992). In that decision, this office found that portions of the activities of the Dallas Museum of Art (the "DMA") were generally supported in whole or in part with public funds, specifically funds of the City of Dallas. In clarifying the scope of information held by the DMA that is therefore subject to the Act, we stated:

> Accordingly, records related to those parts of the DMA's operation *directly supported* by the city, such as records regarding maintenance and ownership of the building and grounds, the city's art collection, utility bills [paid by the city], salaries of those employees for whom the city pays a portion, and insurance policies on which the city has paid part of the premium, are subject to the Act. However, those areas of the DMA for which the city has not provided *direct support* are not subject to the [A]ct.

Open Records Decision No. 602 at 5 (1992) (emphasis added). Because the records at issue in that decision had only a *tangential* connection to those parts of the DMA's operations that received direct support from public funds, the decision concluded that the information at issue was not subject to the Act. *Id.* at 5-6. Likewise, in the present situation, we believe that records pertaining to those parts of Child Advocates' CAC and CASA programs directly

supported by public funds are subject to the Act, but that records with only a tangential relationship to the receipt or expenditure of public funds do not fall within the scope of "public information" under the Act. With this standard in mind, we have marked with green flags the pages from the submitted representative sample of responsive documents that we believe contain or consist of "public information" under the Act. With regard to this information, we therefore next address your section 552.101, 552.102, and 552.103 assertions, beginning with the latter assertion.

Section 552.103 of the Act excepts from disclosure information:

> relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.
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> [Information is excepted from disclosure] only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). Section 552.103 was intended to prevent the use of the Act as a method of avoiding the rules of discovery in litigation. Attorney General Opinion JM-1048 at 4 (1989). The litigation exception enables a governmental body to protect its position in litigation by requiring information related to the litigation to be obtained through discovery. Open Records Decision No. 551 at 3 (1990). To show that the litigation exception is applicable, Child Advocates must demonstrate that (1) litigation was pending or reasonably anticipated at the time of the request and (2) the information at issue is related to that litigation. *See* Gov't Code § 552.103(a), (c); *see also Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.-Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). You contend that litigation involving Child Advocates was reasonably anticipated at the time of the request. To demonstrate that litigation is reasonably anticipated, Child Advocates must furnish evidence that, at the time of the request, litigation was realistically contemplated and was more than mere conjecture. Gov't Code § 552.103(c); Open Records Decision No. 518 at 5 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). This office has found that the fact that a prospective plaintiff has hired an attorney who then makes a request under the Act is alone insufficient to trigger the protection of section 552.103. Open Records Decision No. 361 at 2 (1983). This office has also declined to apply the litigation exception where the prospective plaintiff made public threats to sue, but took no further action towards litigation. Open Records Decision No. 331 at 1 (1982). Under the totality of the circumstances, we believe in this instance that Child Advocates has not sufficiently demonstrated, for purposes of section 552.103, that litigation was reasonably anticipated at the time of the request. As to the second prong of the above-stated test, we also believe you have failed to demonstrate how the information at issue relates to any

anticipated litigation. Accordingly, section 552.103 of the Act has not been demonstrated to apply in this instance.

Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101 of the act. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685. You have submitted no comments in support of the applicability of section 552.102 to any of the submitted information, nor have you marked any of the information as excepted by this provision. *See* Gov't Code § 552.301(e)(1)(A), (2). From our review of the submitted samples, we find no information that must be withheld pursuant to section 552.102.

As quoted above, section 552.101 of the Act encompasses not only information protected by statute but also information made confidential by constitutional law or by judicial decision. You assert that those portions of the information that identify donors and volunteers may be withheld under section 552.101 in conjunction with the holding of the Texas Supreme Court in *In re Bay Area Citizens Against Lawsuit Abuse*, 982 S.W.2d 371 (Tex. 1998). In that decision, the Texas Supreme Court determined whether the First Amendment of the U.S. Constitution's protection for freedom of association could operate to protect an advocacy organization's list of contributors from compelled disclosure through a discovery request in pending litigation. The Court stated:

> Freedom of Association for the purpose of advancing ideas and airing grievances is a fundamental liberty guaranteed by the First Amendment. Compelled disclosure of the identities of an organization's members or contributors may have a chilling effect on the organization's contributors as well as on the organization's own activity. For this reason, the First Amendment requires that a compelling state interest be shown before a court may order disclosure of membership in an organization engaged in the advocacy of particular beliefs. It is immaterial whether the beliefs sought to be advanced by the association pertain to political, economic, religious or cultural matters, and state action which may have the affect of curtailing the freedom to associate is subject to the closest scrutiny.

Id. at 375. In determining whether disclosure may have the affect of curtailing the freedom to associate, the Court held that the party resisting disclosure bears the burden of making a *prima facie* showing that disclosure will burden First Amendment rights. Quoting the U.S. Supreme Court in *Buckley v. Valeo*, 424 U.S. 1, 74 (1976), the Court determined that the party resisting disclosure must show "a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassments, or apprisal from either government officials or private parties." *Id.* at 376. Such proof may include "specific evidence of past or present harassment of members due to their organizational ties, or of harassment directed at the organization itself." *Id.* You argue that Child Advocates has in this instance made the requisite *prima facie* showing to this office.

Considering the representations made to this office, the supporting information submitted, and the totality of the circumstances, we agree that you have made a *prima facie* showing that disclosure of the identities of contributor's to Child Advocates in this instance will burden First Amendment rights of freedom of association. We believe the term "contributor" encompasses the identities of those individuals who make financial donations to Child Advocates. Because we understand the volunteers to donate their time and services to Child Advocates, we believe these individuals, with the exception of the members of the organization's governing board, also fall within the scope of the "contributors" whose First Amendment right to Freedom of Association is implicated. Therefore, to the extent the types of documents we have identified herein as subject to the Act contain specific information that identifies an individual as a contributor or volunteer, we conclude Child Advocates may redact such information from the documents, prior to their release.[3] We emphasize that the information may be withheld under section 552.101 only to the extent reasonable and necessary to protect the identity of the contributor or volunteer. The remaining responsive information, as exemplified in the submitted samples that we have marked, is subject to release to the requestor.

In summary, the information responsive to the first three requests must be withheld in its entirety pursuant to section 552.101 of the Government Code. As to the fourth request, those responsive records pertaining to the parts of Child Advocates' programs directly supported by public funds are subject to the Act, and we have marked with green flags examples of such information. The information responsive to the fourth request that is subject to the Act is not excepted from disclosure by sections 552.102 or 552.103. However, Child Advocates may redact from these records, pursuant to section 552.101, information that identifies

[3]Of course, as explained above regarding the scope of responsive information that is "public information" subject to the Act, contributor and volunteer information pertaining to programs and activities of Child Advocates other than CAC and CASA programs (such as contributors and volunteers with the Development Committee) does not fall within the scope of "public information" under the Act. Therefore, this contributor and volunteer information is not subject to disclosure, notwithstanding the question of whether section 552.101 would otherwise apply.

volunteers and contributors. The remaining information contained in these records is subject to release to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for

contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

Michael Garbarino
Assistant Attorney General
Open Records Division

MG/seg

Ref: ID#142609

Encl. Submitted documents

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